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Research Article

Is Legalism always the Best Approach? Between an Atomistic and Holistic Approach to Post-Conflict Societies

Jasmin Ademović LLB (Hons), LLM International Criminal Law
Legal & Contracts Manager, Thales, Doha Metro Project
jas@scm-globe.com

Abstract

This paper is based on the premise that an overreliance on law in transitional justice fails to sufficiently address the long-term aims of healing and reconciliation, particularly in post-conflict societies. As a result of transitional justice's political, international and institutional character in the form of legalism, other viable mechanisms are restricted. The key issue revolves around the ownership of any process and the failure of transitional justice to sufficiently consider aims outside retributive justice and the legitimacy of the state post-conflict. Focusing on legalism's above characteristics, this paper considers the practical problems that legal dominance creates and discusses the quasi-judicial alternatives of gacaca and Truth and Reconciliation Commissions, before taking into account the practices in post-Communist Eastern Europe.

Keywords: International criminal law; Transitional justice; Bosnia; Gacaca; Legalism

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مقالة بحثية

هل التطبيق الصارم للقانون هو السبيل الأمثل دوماً؟ بين المقاربة الجزئية والمنهج الشمولي في فهم مجتمعات ما بعد الصراع

جاسمين أديموفيتش

بكالوريوس في الحقوق مع مرتبة الشرف

ماجستير في القانون الجنائي الدولي

مدير الشؤون القانونية والعقود، شركة تيلز، مشروع مترو الدوحة

jas@scm-globe.com

ملخص

يستند هذا البحث على فرضية مفادها أن الاعتماد المبالغ فيه على قوة وسيادة القانون في العدالة الانتقالية يفشل في تحقيق الأهداف البعيدة المدى المتمثلة في التئام المجتمع والوصول إلى المصالحة، خصوصًا في مجتمعات ما بعد الصراع. وبسبب الطبيعة السياسية والدولية والمؤسسية التي تصاحب العدالة الانتقالية، والتي تتمثل في التطبيق الحرفي للقانون، تُفرض القيود على استخدام آليات أخرى رغم قابليتها وصلاحيتها للتطبيق. وتكمن المشكلة الأساسية فيمن يملك اتخاذ القرار في تطبيق أية معالجة، وفشل العدالة الانتقالية في إدراك أهداف أخرى خارج إطار العدالة الانتقامية وفرض شرعية الدولة في مرحلة ما بعد النزاع. ومن خلال التركيز على السمات والخصائص المذكورة أعلاه والتي تصاحب التطبيق الصارم لنص القانون، يلقي البحث نظرة على المشاكل المصاحبة لهذا التطبيق، ثم يناقش البدائل شبه القضائية مثل نظام الجاكاكا (Gacaca) ولجان تقصي الحقائق والمصالحة، وبعدها يلقي نظرة على الممارسات التي طُبقت في مجتمعات أوروبا الشرقية عقب انتهاء حقبة الشيوعية.

الكلمات المفتاحية: القانون الجنائي الدولي، العدالة الانتقالية، البوسنة، نظام الجاكاكا، سيادة القانون

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Introduction

Transitional justice encompasses a variety of processes and methods, carried out with the purpose of ensuring a society is able to come to terms with and transition from a history of large-scale abuse and/or conflict, by way of ensuring accountability, serving traditional notions of justice and enhancing the prospect of reconciliation.[1] One of the tools utilized is "legalism"—the legal prosecution of perpetrators via judicial mechanisms. In contrast, non-judicial mechanisms include lustration, truth, and reconciliation commissions (TRCs) and other quasi-judicial processes, such as Rwanda's *Gacaca*, not to mention various politically and economically focused reforms.

While the past twenty-four years have seen an expansion in the scope of mechanisms utilized and effectiveness of transitional justice both as a field of study and in its practical implementation, the primary focus at the international level has been legalism. The most significant examples are the formation of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), along with various domestic prosecutions and ad hoc hybrid tribunals in Cambodia, East Timor, Sierra Leone, Lebanon, and Kosovo.

The dominance of legalism, which is typically administered via a top-down, centralized and internationalized format, using the Yugoslav blueprint, has left behind a considerable deficit that in the long run, both for the effectiveness of legal objectives and the success and viability of transitioning states, is likely to prove counterproductive.

This atomistic focus on prosecutions, primarily targeting a small number of individuals either under direct command or responsibility, highlights the lack of a truly holistic approach to transitional justice. The net effect is an overreliance on criminal justice mechanisms, signifying not only that transitional justice has become self-serving, largely of, by, and for international criminal law practitioners, but that it has been set up for failure. The consequences of such failures are potentially catastrophic. At present, there appears to be relatively little danger in Rwanda and Cambodia. In contrast, Bosnia and the western Balkans continue to present a significant risk of relapse. Plagued by continued racial division, endemic corruption, economic failure, nationalist or ethnic-based political discourse and a quietly simmering tension, Bosnia is seen by many commentators and observers as possessing the ingredients for another armed conflict.[2]

Of course, transitional justice mechanisms cannot carry the whole weight of expectations for transitioning post-conflict states; the role of international diplomacy and the post-conflict political order, including internationally imposed economic and political reforms, prove to be of fundamental importance. In Bosnia's context, the failures of the Dayton Agreement beyond the initial short-term goals of ending the war and providing a degree of stability for the transition are clear to see. While it is difficult to sever liability for the nation's failures, a key concern has always been the political foundation laid by Dayton.

At the same time, once Bosnia's legally focused transition is compared to, for example, Rwanda, the lack of sufficiently wide-ranging non-legalist methods is noticeable. It is this exclusivity that has played a crucial role in fostering a level of stasis and never-ending tension. However, even the internationalized focus of legalism has failed within the parameters of delivering justice and accountability on account of prosecutions largely targeting leading national and regional figures within the conflict. In contrast to Rwanda, an overwhelming number of the perpetrators continue to live freely without the prospect of any retributive justice. Beyond this is the failure to expand the scope of the transition to include, for example, TRCs as a way for perpetrators to admit their guilt and to reveal how individuals were killed or where the last remaining bodies and mass graves are located.

1- U.N.S.C., *Secretary general report on rule of law and transitional justice in conflict and postconflict societies*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616.

2- See Timothy Less, *The next Balkan wars*, New Statesman (June 6, 2016), https://www.newstatesman.com/world/2016/06/next-balkan-wars (last visited Jan. 2, 2018).

Importance of Law

Theoretically, law can deliver justice and provide accountability for violations of human rights. The prosecution of perpetrators of, for example, genocide, crimes against humanity and war crimes is naturally of fundamental importance to victims of such atrocities who are owed a form of retributive justice for their suffering, just as perpetrators are deserving of punishment for their acts. Such goals strike at the very heart of law.

On a political level, it is in the interests of the international community and the transitioning state to ensure gross violations of human rights are punished in order to discredit and contain dictatorial or destabilizing political forces and make a positive contribution to post-conflict peace-building.[1] As McEvoy argues, "law becomes an important practical and symbolic break with the past, an effort to *publicly* demonstrate a new-found legitimacy and accountability."[2] In this vein, "until Nuremberg, for the victims of German aggression all Germans and Germany as a whole were guilty; after Nuremberg, concrete Germans and the Hitler regime were guilty."[3] The reassertion of state authority is often achieved through the application of the rule of law for fear that "the absence of functioning centralized state institutions becomes a byword for lawlessness."[4] Law, therefore, dominates in an environment of reconstruction because it represents "a way of conceptualizing and articulating how we would like the social world to be."[5]

However, its effectiveness must be measured by what does not happen in the future; from a naturalist perspective, law is only successful if it "help[s]…prevent future atrocities through the power of moral example to transform behavior."[6] Just as we should use prosecutions as a way to prevent future atrocities, and therefore should judge their effectiveness within this context, we should also consider the success or failure of any transitional justice process in light of whether a society has been able to successfully transition.

Two Sets of Goals

Inevitably, this legalist approach manifests itself in a top-down manner, directed by the state or international institutions, resulting in transitional justice being "rooted firmly in the formal mechanisms and institutions of international criminal justice rather than in the communities most affected by conflict."[7] Consequently, the purpose of the process becomes blurred; it centers on international and state level issues—from the need to reestablish international peace and security, to the creation of functioning state institutions.

The fundamental problem with such a methodology is that it gives little regard to transitional justice's long-term goals of reconciliation of society and the "healing of wounds" of individual victims. Such methodology fails to recognize transitional justice as a process involving victims as individuals and as societies. No court, for example, can tell the full story of the Rwandan genocide or explain the remaining social divisions between Bosnian Muslims, Croats, and Serbs in Bosnia.

While both sets of goals—justice and reconciliation—are not exclusive of one another, a focus on justice exists because of the glorification of law.[8] This glorification contributes to the exclusion of "local

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1- Payam Akhavan, *Beyond impunity: Can international criminal justice prevent future atrocities?* 95 Am. J. Int'l L. 7, 7 (2001).

2- Kieran McEvoy, *Beyond legalism: Towards a thicker understanding of transitional justice*, 34.4 J. L. & Soc. 411, 417 (2007).

3- Pierre Hazan, *The Revolution by the ICTY: The concept of justice in wartime*, 2.2 J. Int'l Crim. Just. 533, 540 (2004).

4- McEvoy, *supra* note 4, at 422.

5- Id. at 416.

6- Akhavan, *supra* note 3, at 10.

7- McEvoy, *supra* note 4, at 414.

8- Id. at 426.

communities as active participants," in turn "raising fundamental questions of legitimacy, local ownership and participation,"[1] posing a threat to genuine reconciliation.

This writer does not contend that legalism is useless, unnecessary, or a hindrance to the transitional processes, but that its fundamental flaw is its hegemony to the detriment of other mechanisms. Clearly, legalism acts and indeed should act, as the foundation or framework to the entire transitional process. Nevertheless, a complicated balancing act is necessary; judicial mechanisms are ineffective without complementary non-judicial mechanisms and vice versa.

Legalism's dominance can be grouped under an umbrella of "universality"—under the logic that deficiencies arise from transitional justice's basis in "Western conceptions of justice."[2] This encapsulates transitional justice's political, internationalized and institutional nature that many legal practitioners and politicians refuse to acknowledge.

Legal Dominance—Political Character

When writing about the 1949 North Atlantic Treaty, Katz suggested that "[t]he…procedures are diplomatic, and the relevant intellectual canons are the canons of political thought—with something added….a sense of law."[3] The essence of his point also captures the nature of transitional justice. At its core, it is usually a political compromise, meeting at an intersection of law, diplomacy and political theory.

It is on this (political) balance upon which the question of whether legalism is always the best approach to transitional justice rests. The relevant approach determines "ownership" of the justice process just as the goals of any transition determine the mechanisms adopted.

However, there exist practical deficits based on a failure to ask what the goal is and whom it is for, which leads to the problems of legal dominance, because if the process is "divorced from serious consideration of the wider political, social or cultural contexts which produced violence in the first place, the potential… to prevent future violence is correspondingly reduced."[4] Instead, the process is simplified to the level of a "ritualistic attempt to restore equilibrium to a moral universe overwhelmed by evil."[5]

Internationalized and Institutionalized

Alongside its political character, transitional justice is another example of the internationalization of law "wherein law's centrality to globalization in general and international politics in particular has far outstripped its historic limitations associated with the notion of state sovereignty."[6] Its internationalized and centralized nature leads to law playing a vital role in the promotion of principles "such as justice, objectivity, certainty, uniformity, universality [and] rationality."[7] While this is indeed valuable to the emergence of a functioning state, its real-life application is left wanting due to the nature of the legal mechanisms adopted.

The use of a Westernized paradigm manifests itself in the form of international tribunals and so-called universal principles. However, this fails to embrace local suffering, which leads to "a poor understanding of peace transformation."[8]

1- Patricia Lundy & Mark McGovern, *Whose justice? Rethinking transitional justice from the bottom up*, 35.2 J. L. & Soc. 265, 266 (2008).

2- Id. at 277.

3- D. J. Harris, *Cases and Materials on International Law* 8 (2004).

4- McEvoy, *supra* note 4, at 419.

5- Akhavan, supra note 3, at 7.

6- McEvoy, *supra* note 4, at 416.

7- Id. at 417.

8- Lundy & McGovern, *supra* note 11, at 278.

Ultimately, legalism provides ownership to international institutions and the transitioning state, with a superficial consideration for the victims of large-scale abuses. In this respect, legalism, in the form of international institutions,[1] proves to be the best approach for the field of international criminal law, as an exercise in itself. Such institutions become largely 'institutions of, in and seemingly for the international community,"[2] which represents little practical use for victims in tackling the past.[3]

In contrast, as Akhavan argues, "[j]ustice delivered close to the affected societies may encourage post conflict reconciliation and emerging democratic forces far more effectively than justice delivered in the remote confines of The Hague."[4]

Judicial mechanisms can only be improved by holding trials where the atrocities occurred, which not only benefits victims but helps the "state reestablish [sic] itself with its new and presumably more democratic government."[5] Furthermore, as Hafner and King suggest, national and international trials can and should complement each other,[6] as the ICTY and the War Crimes Chamber of the State Court of Bosnia and Herzegovina have increasingly done so.

The Effectiveness of Legal Methods?

Question marks remain, especially from a naturalist perspective, with regards to the effectiveness of individual criminal responsibility, which may "have no net effect on the number of war crimes—or even an effect opposite of the one intended."[7] At best, the "general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative."[8] Individual criminal responsibility has not stopped nor, arguably, reduced the commission of international crimes globally, as has been plainly evident in countless war zones since 1995, from Chechnya to Syria. War crimes prosecutions have not prevented the possible genocides that took place in Darfur, Sri Lanka, Myanmar, Syria and Iraq. The best-case scenario is that prosecutions regarding, for example, the former Yugoslavia will have a meaningful, long-lasting impact on the former Yugoslav republics by enforcing the rule of law and demonstrating a degree of justice to victims so that the 1991–1999 wars may never be repeated. At best, legalism may only work in helping a country avoid relapsing into bloodshed rather than setting a precedent for parties engaged in armed conflict elsewhere, as is all too obvious. International criminal law practitioners will, therefore, continue to find employment opportunities in this "growing market."

Nevertheless, there are clear political considerations that blunt the effectiveness of the judicial approach. For example, the failure to indict Tuđman, Šušak and Boban for crimes committed in Croatia clearly "moderated the ICTY's impact on post-conflict peace building and long-term prevention of elite-induced ethnic conflict."[9] If Radovan Karadžić is to be believed—and on this matter, he is, in Bosnia and the rest of former Yugoslavia—he was offered immunity from international criminal law prosecution by Richard

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1- In the form of the ICTY, ICTR, and ICC.

2- Lundy & McGovern, *supra* note 11, at 278.

3- Sebina Sivac-Bryant, *The Omarska Memorial Project as an example of how transitional justice interventions can produce hidden harms*, 9 Int'l J. Transitional Just. 170, 171 (2015).

4- Akhavan, *supra* note 3, at 18.

5- Donald L. Hafner & Elizabeth B. L. King, *Beyond traditional notions of transitional justice: How trials, truth commissions, and other tools for accountability can and should work together*, 30 B.C. Int'l & Comp. L. Rev. 91, 96 (2007), http://lawdigitalcommons.bc.edu/iclr/vol30/iss1/6 (last visited Jan. 2, 2018).

6- Id. at 97–98.

7- Michael Davis, *What punishment for the murder of 10,000?* 16.2 Res Publica 101, 104 (2010).

8- David Wippman, *Atrocities, deterrence, and the limits of international justice*, 23.2 Fordham Int'l L. J. 473, 488 (1999).

9- Akhavan, *supra* note 3, at 19.

Holbrooke in exchange for leaving politics and public life.[1] Such double standards naturally limit the effectiveness of prosecutions and any deterrent effect.

While it is clear that impunity is an impediment to peace and stability,[2] "the international community has accepted international crimes committed as an instrument of statecraft and political control."[3] This strikes at the heart of the problems associated with transitional justice—its failure to admit its political character and broaden the scope of legalism to distribute ownership of the process beyond the "the distant war crimes process."[4]

Alternative Mechanisms

It is because of the law's dominance that issues of legitimacy and (victim) ownership are raised, threatening what arguably should be transitional justice's key long-term aim: reconciliation, whether it be in a post-conflict or a newly democratic state. While no single mechanism can guarantee the achievement of such a goal, non-judicial approaches are able to overcome a number of the difficulties considered above.

Lundy and McGovern pointed out that if the aim of the transition is long-term peace and reconciliation, then "placing issues of ownership and participation at the center of long-term post-conflict justice"[5] is crucial. Legalism, at the very least, when adopted on its own is insufficient because "[t]o imagine that the horrors of genocide can be contained within the confines of judicial process is to trivialize suffering that defies description."[6]

Restorative Justice

Although there are rarely immediate results,[7] practices in Rwanda, Guatemala, South Africa and Northern Ireland demonstrate that supported program in local community structures are able to engage in and make a significant contribution to long-term healing and reconciliation.[8] This contrasts with Bosnia's experience, where although reparations, exhumations, houses of memory and memorials were initiated, there were no truth commissions or community-based dialogues. Programs seeking to establish such processes were quickly abandoned. As a result, there still exist two sets of narratives between victim and perpetrator, with continued mistrust at all levels of society.

Gacaca in Rwanda

The move toward restorative justice, away from the purely retributive justice of the ICTR and Rwandan authorities via the adoption of "a new type of tribunal known as *Gacaca*, based on indigenous models of local justice,"[9] is a welcome development. The "one-time opportunity to give testimony… [at an international tribunal or national court] cannot substitute for the long-term rehabilitation of survivors.

1- Bruno Waterfield, *US envoy Richard Holbrooke 'did' offer Radovan Karadzic immunity*, The Telegraph (Mar. 23, 2009), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5039381/US-envoy-Richard-Holbrooke-did-offer-Radovan-Karadzic-immunity.html (last visited Jan. 2, 2018).

2- Akhavan, *supra* note 3, at 28.

3- Id. at 13.

4- Sivac-Bryant, *supra* note 21, at 171.

5- Lundy & McGovern, *supra* note 11, at 279.

6- Akhavan, *supra* note 3, at 10.

7- Laura Arriaza & Naomi Roht-Arriaza, *Social reconstruction as a local process*, 2.2 Int'l J. Transitional Just. 152, 164 (2008).

8- McEvoy, *supra* note 4, at 428.

9- William A. Schabas, *Genocide trials and Gacaca courts*, 3.4 J. Int'l Crim. Just. 879, 881 (2005).

Longer term, local-level processes are needed for that type of healing."[1] Victims become more than tools of prosecutors in Arusha, achieving a degree of local ownership, as the historical record is established when perpetrators confess and name accomplices.[2]

Truth and Reconciliation Commissions have the potential to "grant…victims the dignity of formal acknowledgment of their suffering, even if they personally do not appear as witnesses,"[3] in addition to developing a broader picture of atrocities, which aids the truth-seeking aspect of transitional justice and better clarifies the historical record. This process may do more for dignity, healing, and reconciliation than the prosecution of political leaders, by ensuring that perpetrators are unable to "equalize responsibility and de-ethicize the victims."[4]

It must, however, be noted that *Gacaca* and the TRC's impact depends upon the existence of parallel legal prosecutions, otherwise the offer of "amnesty for truth" would do little. And while they may fall into a framework of quasi-justice, supporters of retributive justice would point to a human rights deficit for the accused. However, the same is true for the 80,000-plus suspects that were detained for up to ten years under appalling conditions while they awaited trial in Rwanda.[5]

In Rwanda, extraordinary measures are clearly necessary and the fear that *Gacaca* may be "perceive[d]…as an exercise in victor's justice" or as a way of imposing "collective guilt on the Hutu majority"[6] is misplaced. The same accusation can be leveled at the ICTR, but in the eyes of many it would not dent its role as the "best means of determining responsibility."[7]

Furthermore, the prosecution of a few leaders or instigators is insufficient.[8] The writer cannot ascribe to Akhavan's view that "[p]revention and punishment should focus primarily on those unscrupulous leaders who goad and exploit the forces advocating a spiral of violence"[9] as has been the policy with regards to the former Yugoslavia. International crimes, particularly genocide, "are forms of group behavior" and "manifestations of group crime…[and] political violence,"[10] so the resulting prosecutions must be all-encompassing. Indeed, the Rwandan government "has adopted an expansive prosecutorial strategy, incarcerating everyone it suspects of crimes of genocide throughout all strata of Rwandese society."[11]

Once the "attrition rate"[12] and the sheer volume of potential defendants is taken into account, it is clear that *Gacaca* presents a real opportunity to simultaneously engage with local communities and deliver justice, particularly as a way of balancing the human rights deficiencies evident in the Rwandan prosecutorial approach.

A significant development, however, exists in regard to truth-seeking objectives—namely, the increasingly

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1- Arriaza & Roht-Arriaza, *supra* note 34, at 158.

2- Schabas, *supra* note 36, at 881.

3- Hafner & King, *supra* note 23, at 101.

4- Sonja Biserko, *A look into the past means a step towards the future*, Bosnian Institute (Oct.–Dec. 2004), http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=1154&reportid=166 (last visited Jan. 2, 2018).

5- Schabas, *supra* note 36, at 888.

6- Max Rettig, *Gacaca: Truth, justice, and reconciliation in post-conflict Rwanda?* 51.3 Afr. Stud. Rev. 25, 26 (2008).

7- Hafner & King, *supra* note 23, at 92.

8- *Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Oral Pleadings, ICJ Rep., 53 (March 7, 2006).

9- Akhavan, *supra* note 3, at 10.

10- Alette Smeulers, *Punishing the enemies of all mankind*, 21.4 Leiden J. Int'l L. 971, 977 (2008).

11- Aneta Wierzynska, *Consolidating democracy through transitional justice: Rwanda's Gacaca courts*, 79.5 NYU L. Rev. 1934, 1936 (2004).

12- McEvoy, *supra* note 4, at 436.

inquisitorial or hybrid approaches in international criminal courts. This, to an extent, blunts the utility of TRCs and *Gacaca* style approaches because "criminal prosecution of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means,"[1] which in turn contributes to the legitimacy of the new social order and the healing of individual victims. Of course, such an objective will always remain secondary to the primary process of determining the guilt of individual defendants, while remaining far from the comprehensive account of atrocities that is necessary. Present-day inquisitorial prosecutions may not have the same effect that Nuremberg and subsequent transitional justice initiatives had on the German and European psyches.

Nationalist Myths and Nation-Building

A broader, holistic approach may have spared Bosnian victims the scenario in which Serb nationalist forces were able to create an atmosphere of denial in the former Yugoslavia to the extent that a Republika Srpska official report described the Srebrenica genocide as a mass suicide on the part of Bosnian Muslims. Even twenty years after the Srebrenica genocide, local Serbs, as well as Russian, Serbian, and Bosnian Serb politicians, continue to question the established narrative, which not only harms reconciliation but is likely to be a cause of future violence.

Attempts at creating a memorial at the Omarska concentration camp outside Prijedor in Bosnia failed miserably because there still exists a veil of silence, a refusal to acknowledge past abuses. Victims must suffer the all too prevalent remark that "nothing happened at Omarska," despite the fact that "the crimes committed in Prijedor are known to every citizen of the town even if it is not openly spoken about."[2] Exacerbating tensions, the British mediator in Prijedor managed to assemble a committee comprised of fourteen Serbs, six Muslims and four Croats,[3] disregarding the notion of a victim-led process. However, the issue of ownership also extends to inter-Muslim tensions between returnees and diaspora, with accusations of extremism leveled at those (diaspora) more belligerent in their interactions with local Serbs.[4] While local returnees have little choice but to engage in cordial relations with their Serb neighbors, the summertime returning diaspora view this cordiality as borderline treasonous. However, even local Muslims do not view their largely civil interactions with Serbs as a sign of progress. It is merely convenience.

In the writer's hometown of Srebrenica, such sentiment is more pronounced. Every summer, tensions grow, people begin to mutter under their breath, looking at each passer-by to determine whether they are Muslim or Serb, or rather "balija" or "četnik." Such outcomes are perhaps understandable when one side is the victim of genocide and the other refuses to fully admit its past, viewing each prosecution as a form of victimization and an attack on the collective. When Muslims annually congregate at the Potočari Memorial Centre on July 11 to bury the latest round of exhumed corpses, Serbs remember their dead from the summer and autumn of 1992, ignoring the initial murders of the Muslims, who had remained in Srebrenica, in April 1992 by the paramilitary group Arkan's Tigers and the three-year siege that followed the Bosnian Army liberation. At the July 2016 ceremony, Bosnian Muslim survivors refused to permit any Serbian and Republika Srpska government officials to attend on account of continued denials over the Srebrenica genocide.[5]

TRC and *Gacaca*-style approaches offer something simple but absolutely necessary—the opportunity for individuals and communities to talk. The lack of a TRC or similar mechanism allows a nation or people to

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1- Hafner & King, *supra* note 23, at 93.

2- Sivac-Bryant, *supra* note 21, at 174.

3- Id. at 177.

4- Id. at 176.

5- Maja Zuvela, *Srebrenica buries 127 victims of massacre, Serbs absent over genocide denial*, Reuters (July 11, 2016), https://ca.reuters.com/article/topNews/idCAKCN0ZR1IC (last visited Jan. 2, 2018).

forget its crimes. Naturally, the outside world will know the truth, possibly imposing a collective guilt on the ethnic or national group of the perpetrators. In turn, this fosters a victimhood or siege mentality. Many nations share this experience; their unwillingness to speak openly about past crimes, whether European genocide in the Americas, the United States genocide of Native Americans leaves them open to further scrutiny and guilt by association or denial. Contrast this to Germany's ownership of its history. Within the Serbian context, silence and lies become a prerequisite for the propagation and advancement of "Greater Serbia" myths and nation-building,[1] ad they not only shield the nation from hard truths but protect its elite. Such denials lead to the perpetration and ghettoization of future generations.[2] Once these generations forget their nation's history, they face the prospect of repeating the sins of their forefathers. This is the point at which transitional justice officially fails.

Non-Judicial Eastern Europe

Somewhat anomalously, in former Communist dictatorships, as a result of political necessity, there have been no significant attempts at judicially inspired transitions. Instead, the process has largely revolved around mechanisms such as lustration, memorials, and the release of state documents.

This non-judicial approach is based on a "sharp line of demarcation, between what has been done in the past and the need to move forward."[3] Such a view is perhaps only reached by a belief in the moral ambiguity of decision making in dictatorial states and thus creates unease with prosecuting, for example, informants.[4]

However, significant criticisms have been leveled at such policies on the basis that they failed to achieve much beyond moving along the business of government. Post-communist governments were more preoccupied with market liberalization and the adoption of neo-liberal economic policies with the potential to inflict a new form of (economic) injustice on ordinary citizens. It is difficult to conclude that justice was served or reconciliation was achieved. However, the issue of reconciliation in post-dictatorial states is not as profound as it is to post-armed conflict states, so the threshold can be lowered.

Recommendations

Going forward, transitional justice processes in Sri Lanka, Syria and elsewhere, ideally instigated by the United Nations, will require the formulation of broad holistic strategies, from utilizing local level prosecutions to the implementation of non-judicial mechanisms such as TRCs. Transitional justice has the potential to be the ignition for a new society—one forced to confront past abuses and to engage in dialogue. These processes, with the exception of their formation, will require locally led implementation.

Within legalist mechanisms, there needs to be a recalibration to neutralize the overt international and institutionalized characteristics of prosecutions, away from the ICC and ICTY model to one centered on hybrid courts, as in Cambodia. Such courts, embedded within the domestic jurisdiction of the affected society, would represent the best of two approaches, in turn overcoming the difficulties domestic prosecutions face in their limited capacity and experience, while also guaranteeing a local process and ownership. Not having to solely resort to the ICC's complementarity would aid the development of the state and its institutions going forward, demonstrating a degree of competence and legitimacy in the new political and legal order. The courts' simplified procedure and reduced cost will strengthen retributive justice aims in being able to prosecute a greater number of perpetrators. The local-level process would

1- Ensar Eminović, *Ruski veto je geto*, Al Jazeera Balkans (July 13, 2015), http://balkans.aljazeera.net/vijesti/ruski-veto-je-geto (last visited Jan. 2, 2018).

2- Id.

3- A. James McAdams, *Transitional justice: The issue that won't go away*, 5.2 Int'l J. Transitional Just. 304, 305 (2011).

4- Id. at 309.

allow the embrace of local suffering, giving voice to the victims and increasing the chances of reconciliation through local dialogue.

Ultimately, acknowledgment of past crimes and abuses is a prerequisite for reconciliation, the first of many steps. The appropriation of the narratives of victims and survivors must not be permitted, both by the legal process and the perpetrators. A quasi-*Gacaca* or, more likely, a TRC process is also necessary—the public shaming and confessions of known perpetrators, as well as the forced revelation of still unidentified mass graves, offer an opportunity for rehabilitation and healing. Such truth-seeking objectives are evident in the work of the ICTY, but the distant process appears to have had little positive impact on both Muslim and Serb psyches in Bosnia. Both groups shrug at the news of another drawn-out prosecution, unable to let go of the past, unable to accept the historical record, forever stuck in 1995. A TRC, with the necessary international backing and financing, would, at the very least, force both sides to talk to one another outside the traditional confines of politics and prosecutions. The original sin in Bosnia's transition was the Dayton Agreement, which legally enforced gains from ethnic cleansing and genocide, legitimized nationalist politics and myths and cemented divisions across the country. The focus on ICTY prosecutions did little to address these structural problems.

Future TRCs need to learn from past mistakes, the most notable of which is stifling time constraints. The investigation of all alleged crimes without time constraints, as seen during the Chile Commission, along with the necessary funding and political will is paramount. One only has to contrast Chile's political, economic, and societal development with that of El Salvador to notice that providing ownership, truth-seeking and an opportunity for dialogue is crucial. One is peaceful and developing; the other faces a refugee crisis and exodus because of high rates of homicides, corruption and gang warfare. Of course, this is anecdotal, but the different TRC routes taken by each has undoubtedly contributed to their respective divergent state of affairs.

Moreover, adequate top-down funding for bottom-up projects, such as museums and memorials, plays a significant part in the healing process. However, the key to all of this is political will—if the international community and future national governments refuse or fail to follow through, the transition will be incomplete. The top-down approach dominates transitional justice because without the resources and support from either international or national actors, bottom-up endeavors cannot begin to deliver on the healing required. This has been the case with Bosnia; Hague-level prosecutions are relatively easy and justifiable, while local-level initiatives prove difficult to pursue, let alone to successfully implement.

Conclusion

In many ways, the question of whether legalism is always the best approach to transitional justice is moot because of its guaranteed "place as the core framework around which transitions from conflict are constructed."[1] Indeed, other policies such as *Gacaca*, TRCs, lustration, and amnesties are themselves "creatures of law."[2] Conversely, these alternative methods are themselves far from perfect. For every moderately successful TRC, another fails outright or is significantly stifled due to politic considerations and limited scope and time frame. Each will have significant trade-offs[3] due to the inexorable link between transitional justice and politics.

Legal remedies are prerequisites for gross violations of law in armed conflict situations. For the sake of

1- McEvoy, *supra* note 4, at 413.

2- Id. at 426.

3- While Chile's commission focused on truth-seeking and the investigation of all 3,000 individual crimes, it did so at the expense of individual criminal responsibility. El Salvador's commission sought to apportion individual responsibility, but, because of a nine-month window, was only able to investigate thirty-two cases, even with 22,000 registered complaints by victims. See Mark Vasallo, *Truth and Reconciliation Commissions: General considerations and a critical comparison of the commissions of Chile and El Salvador*, 33 U. Miami Inter-Am. L. Rev. 153 (2002).

justice and the future of the state, legalism always becomes the best approach by default. Whatever answers one takes from Eastern European experiences, it must be acknowledged that post-armed conflict states do not have the luxury of a purely non-judicial approach.

As this paper has argued, legalism without alternative mechanisms, preferably bottom-up orientated, does not sufficiently look beyond the immediate needs of the state and international criminal justice. Each society will therefore need a broad ad hoc strategy encompassing multiple layers of the transition. Allowing one atomized mechanism to dominate, at the expense of developing a holistic solution to the needs of each society, will not help post-conflict Syria, Libya, Iraq, Afghanistan, and countless others.

This inability to seriously consider and give effect to the various aims of transitional justice has created an overreliance on law—a problem considering the effect its political, internationalized and institutional character has on ownership, truth and reconciliation. This represents a massive risk, as highlighted by the fact that "40 per cent of post-conflict societies return to conflict within a span of five years."[1] In Bosnia's case—and especially because of the increased political risks in the western Balkans, such as the increased threat of terrorism, the refugee and migration crisis, the American pivot away from Eastern Europe, the European Union's various distractions, Russia's expanding presence and influence in the region, not to mention the resurgence of Milošević style nationalists in Belgrade—there is a legitimate and ever-growing risk of conflict. This will mean that, if it is not already the case, transitional justice has failed in the former Yugoslavia. The ICTY's 161 indictments mean very little outside the institutions of international criminal law.

The state of denial prevalent within the Bosnian Serb community in relation to the commission of genocide against Bosnian Muslims is both evidence for the necessity of legalism and the need to move beyond it. The international community's focus on legalism through the ICTY and the domestic prosecutions of a few leaders and commanders has not managed to effectively change this mentality. Considering the collective nature of such violence, whether through direct engagement or silent acquiescence, legal practitioners and politicians must broaden the scope to combat such recalcitrance.

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